Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

Ronald G. Harris,
Susette M. Harris, Petitioners
v.
United States of America

On Petition for Writ of Certiorari to the
United States Court of Appeals to the
Fifth Circuit

Separate Reformatted Appendix of Decisions

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28 pp

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 01-20543

RONALD G. HARRIS, SUSETTE M. HARRIS
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(OPINION 4/17/02, 5 Cir. _____,
_____ F. 3d _____)

Before KING, Chief Judge, REAVLEY and WEINER, Circuit Judges,
PER CURIAM:

(X) The petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. AND 5th Cir R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and that court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5th Cir. R. 35) the petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/: THOMAS M. REAVLEY
UNITED STATES CIRCUIT JUDGE

U. S. COURT OF APPEALS
FILED
JUL 1 2002
CHARLES R. FULBRUGE, III CLERK

CLERK'S NOTE
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 01-20543

RONALD G. HARRIS, SUSETTE M. HARRIS
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas (USDC No. H-99-CV-1940)

Before KING, Chief Judge, REAVLEY and WEINER, Circuit Judges:

PER CURIAM:•

Ronald and Susette Harris appeal the summary judgment entered against them in their suit against the United States for wrongful collection of taxes and wrongful disclosure of tax information. We affirm.

• Pursuant to 5th Cir. R. 47.5,the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

A. Wrongful Collection.

The district court concluded that the wrongful collection claims were barred by the applicable statute of limitations, 26 U.S.C §7433(d)(3). The suit was filed on June 21, 1999. On appeal, the Harrises argue that their wrongful collection claims were not time-barred insofar as they asserted a claim for wrongful governmental conduct occurring on or after June 21, 1997. They abandon all other wrongful collection claims on appeal. The government more or less concedes that the Harrises are correct in this regard, because June 19, 1997 was a Saturday, and under Fed. R. Civ. P 6(a), the deadline for filing a claim was extended to the following Monday, in this case June 21, 1999.

However, we agree with the government that we should not disturb the judgment because an alternative basis for dismissing this claim on the merits exists. We will not reverse a judgment if the district court can be affirmed on any ground, regardless of whether the district court articulated the ground. *United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 765 n.6 (5th Cir. 1996).

"We are free to uphold the district court's judgment on any basis that is supported by the record." *Zuspann v. Brown*, 60 F.3d 1156, 1160(5th Cir. 1995).

The Internal Revenue Code provides taxpayers with a cause of action for damages against the United States where "any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any

provision of" the Code. 26 U.S.C. § 7433(a). The Harrises argue that Internal Revenue Service (IRS) agent Carabeth Luckey violated section 7122 of the Code, 26 U.S.C. §7122. Section 7122(a) provides:

> The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution of defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

We interpret this statute to mean that once the case is turned over to the Department of Justice (DOJ), the authority to settle the case rests with the DOJ rather than the IRS.

As we understand the wrongful collection claim relating to events occurring on June 19, 1997 and thereafter, the Harrises complain that agent Luckey and perhaps others acted in violation of the Code in the manner they handled a settlement offer from the Harrises prior to the sale of their house to partially satisfy the tax judgment. They allege, for example, in paragraph 29 of their amended complaint that "Officers Carabeth Luckey, Chief Felix Carrillo, Group Manager Barbara Howze, [an] unknown official of the Department of Justice and other in connection with collection did recklessly or intentionally disregard " §7122 and "rejected the Harris' offer of $45, 000.00 by asserting that the Department of Justice had authority pursuant to" §7122.

Even under a liberal construction of the complaint. See *Brinkman v Johnson*, 793 F.2d 111, 112(5th Cir. 1986)(noting that pro se complaints are construed liberally), we conclude that summary judgment was warranted on the wrongful collection claim. The case had been referred to the DOJ long before June 19, 1997, and the DOJ therefore ad authority to settle the claim. To the extent the Harrises claim otherwise they are legally mistaken. The Harrises failed to demonstrate any basis under which the DOJ was under a statutory obligation to settle the case for less than the amount of the judgment for unpaid taxes. The 1993 judgment far exceeded the settlement offer from the Harrises. To the extent the Harrises are arguing that Luckey, an IRS agent, had no authority to convey settlement-related communications, such communications do not constitute a statutory violation. The authority of the DOJ to settle the case under §7122(a) dos not in our view prohibit an IRS agent from conveying settlement communications to and from the DOJ.

To the extent that the Harrises are arguing that Luckey failed to communicate their settlement offer to the DOJ, we do not think such a failure constitutes a statutory violation in these circumstances. The record indicates that the Harrises had attempted to settle their tax liability directly with the DOJ as early as 1993. The record also contains an affidavit from Luckey indicating that she had discussed settlement with her superiors and had been told that DOJ would not accept a settlement offer of $45, 000 the Harrises were proposing. The Harrises do not persuade us that Luckey was

under a statutory obligation to convey a settlement offer she believed and had been told the DOJ would reject, when the Harrises were free to do so themselves. Further, the Harrises failed to show, under this theory of liability, that DOJ would have accepted their settlement offer if it had been conveyed, or that they were forced to settle for a larger amount because their offer was not communicated, hence failed to "actual, direct economic damages sustained by the plaintiff as a proximate result of the " conduct of Luckey under 26 U.S.C. §7433(b)(1).

B. Wrongful Disclosure.

With regard to the wrongful disclosure claim under 26 U.S.C. §7431, applicable to violations of the confidentiality requirements of 26 U.S.C. §6103, we agree with district court's analysis of this issue. The comments of IRS spokesman Henry Holmes made to the Conroe Courier reporter were of a general nature, were not based upon personal knowledge of the Harrises' "return information" under 26 U.S.C. § 6103(b)(2), and do not constitute the disclosure of such. Holmes was instead discussing general IRS policies.

The record indicates that IRS officer Luckey was the source of the statement in the article that "IRS agents on hand...confirmed that the taxes owed by the Harrises for a five-year period beginning in 1978 totaled in the 'hundreds of thousands of dollars.'" To the extent that the public record federal court judgment, on file with county real estate records as well, was the "immediate source" of this

disclosed information, a violation of § 6103 did not occur. See Johnson v. Sawyer, 120 F.3d 1307, 1321 n.1 1323(5th Cir 1997). In her affidavit Luckey states:

> *I* explained [to the reporter] that there was a judgment on record in the Montgomery County Court House which was a matter of public record and that he could obtain a copy from the clerk. I explained that the recorded judgment listed the plaintiffs' liability which, beginning in 1978, totaled in the amount of hundreds of thousands of dollars.

To the extent that there was a material issue of fact as to whether the immediate source of the disclosure of the Harrises' tax liability was the judgment itself, we agree with the district court that the disclosure was nevertheless subject to the good faith defense of § 7431(b). We have little to add to the district court's analysis, but make the following observations to respond to certain arguments raised on appeal.

The Harrises argue that Johnson and its rejection of a general "public records" exception to § 6103 was already clearly established as the time of the conduct in issue, because the district court in Johnson had already ruled. In *Huckaby v. United States*, 794 F. 2d 1041, 1048(5th Cir. 1986), we held that the good faith defense under § 7431(b) is analogous to the civil rights qualified immunity defense, which looks to whether the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Id.

(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818(1982). Under analogous civil rights law, we have stated that in determining whether a right is clearly established, we are confined to precedent from our circuit or the Supreme Court. *Boddie v. City of Columbus*, 989 F. 2d 748(5th Cir. 1993). Therefore, the district court's decision in Johnson did not in our view "clearly establish" the absence of a public records exception for purposes of the § 7431(b) good faith exception. To the extent that uncertainty might exist on this question, we should find the good faith exception applicable, since the good faith exception limits the government's waiver of sovereign immunity, and such waivers must be strictly construed in favor of the government. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34(1992).

The Harrises also argue that the government waived the good faith defense by failing to assert it in its answer. The government did assert the defense in its motion to dismiss and for summary judgment, filed before the district court granted plaintiffs leave to file an amended complaint. Regardless, we again note that the good faith defense is a limitation on the government's waiver of sovereign immunity. Absent a waiver of sovereign immunity, the district court had no jurisdiction. *Truman v. United States*, 26 F.3d 592, 594(5th Cir. 1994). Challenges to subject matter jurisdiction can be raised at any time and sua sponte by the court. *Johnston v. United States*, 85 F.3d 217, 218 n. 2 (5th Cir. 1996). The court of appeals has a duty to consider, sua sponte if necessary, the basis of the district court's jurisdiction. *Solsona v.*

Warden, F.C.I., 821 F. 2d 1129, 1132 n. 2 (5th Cir. 1987).

AFFIRMED.

U.S. COURT OF APPEALS
FILED
APR 17, 2002
CHARLES R. FULBRUGE, III CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RONALD G. HARRIS and
SUSETTE M. HARRIS
PLAINTIFFS,

V. CIVIL ACTION
NO. H-99-1940

UNITED STATES OF AMERICA,
DEFENDANT.

MEMORANDUM OPINION AND ORDER

Pending before the Court are Plaintiffs Ronald G. Harris and Susette M. Harris's Motion for Summary Judgment (Inst. No. 23) and Defendant United States of America's Motion to Dismiss and for Summary Judgment (Inst. No. 24). After reviewing the record and the applicable law, the Court concludes that Plaintiffs' motion should be DENIED, and that Defendant's motion should be GRANTED.

I. FACTUAL BACKGROUND

In this tax case, Plaintiffs Ronald G. Harris and Susette M. Harris (the "Harrises") sue Defendant United States of America (United States) pro se for five instances of unauthorized collection actions and unauthorized disclosures of their tax return information.

The essential facts are undisputed. On May 7, 1993, the United States District Court for the Southern District of Texas, reduced the Harrises tax liability into an Amended Final Judgment. Specifically, the court, in Civil No. H-89-2543, ordered that the United States recover from Ronald G. Harris $99, 195.15 in unpaid federal income tax, and that the United States recover from Susette M. Harris $113,552.27 in unpaid federal in come tax. The court also ordered that the United States have federal tax liens over two tracts of the Harrises' real property to secure payment of the unpaid taxes by the Harries; the federal tax liens were superior in interest to the claims made by the Harrises' children. Moreover, the court's order granted permission to the United States to seize and sell the Harrises' property in satisfaction of the Harrises' tax liability. The Final Amended Judgment was filed in the Montgomery County Real Property Records.

The IRS's administration of the court's Final Amended Judgment lies at the heart of the instant action. In particular, the Harrises allege that April 14, 1997, the IRS officer assigned to administratively collect payment from the Harrises, Revenue Officer Carabeth Luckey ("Luckey"), unlawfully determined the Harrises' equity in their real property to be $45,000; this valuation was based on Luckey's perception that a break in the property's title would impose litigation costs on subsequent purchasers of the land. Moreover, the Harrises complain that on, June 5, 1997, Luckey rejected their Offer in Compromise in the amount of $16,000, and that Luckey informed them that

the minimum amount to process an Offer in Compromise would be $45,000. On June 19, 1997, when the Harrises eventually offered to compromise for $45001, Luckey and IRS Group Manager Barbara Howze ("Howze") informed the Harrises that only the Department of Justice ("DOJ") had authority to deal with offers in compromise. When Luckey subsequently advised the Harrises that the DOJ demanded an offer in compromise in the amount of $80,000, the Harrises demanded proof that their $45,001 offer had been, in fact, rejected by the DOJ. That Harrises allege that Luckey refused their demand for proof. The IRS auctioned the Harrises' property on June 24, 1997 for $45,000.

The auction was reported in the June 25, 1997 edition of the *Conroe Courier*, a periodical serving Montgomery County, Texas. In the article, Officer Luckey declined comment on the auction except to say that Harrises' tax liability totaled in the "hundreds of thousands of dollars." Additionally, the IRS public affairs officer Henry Holmes ("Holmes") was quoted in the news story as stating that IRS auctions only come "as a last resort" and that "we understand that when tax situations get to this point that people are very understandably going to be unhappy about it." Holmes also explained to the Conroe Courier that "the IRS really does not engage in the sale of property unless it's the end of the line and has become evident that the taxpayer cannot or will not be able to pay off their debt."

On June 21, 1999, the Harrises filed suit against the United States in this Court, alleging

the IRS engaged in unlawful collection practices and that the IRS engaged in unlawful disclosure of their private tax return information with their comments to the Conroe Courier article, as well as when Officer Luckey disclosed certain information to ABC Land Company on April 28, 1997.

II. Discussion

In its Motion to Dismiss and for Summary Judgment, the United States first argues that this Court does not have jurisdiction to entertain the Harrises' unauthorized collection claims because of subject matter jurisdiction exists for them to be heard. Specifically, the United States contends that the Harrises' have filed suit outside the two-year statute of limitations applicable to this case; consequently, the Harrises cannot pierce the United States sovereign immunity, See United States v. Dalm, 494 U.S. 596, 608(1990). ("Under settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued...and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms.") (quotations omitted).

The Court agrees. Title 26 U.S.C. §7433(a), the statute underlying each of the Harrises' claims, authorized a taxpayer to bring a civil action for damages against the United States when "any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence

disregards" any provision of the Internal Revenue Code or regulations promulgated thereunder. 26 U.S.C §7433(a); *Mason v. United* States of Am. No. 00CV00272, 2001 WL 241799, at *1(D.C. Cir. Feb. 2, 2001). Particularly relevant to the instant case, 26 U.S.C. §7433(d) provides: "Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues. 26 U.S.C. §7433(d)(emphasis added).

As outlined above, the Harrises contend that all of the IRS's allegedly unlawful collection practices, e.g. Luckey's valuation of the Harrises' property; and Luckey and Howze's assertion that only the DOJ had authority to accept the Harrises' Offer in Compromise, occurred between April 14, 1997 and June 19, 1997. Indeed, in their First Amended Complaint, the Harrises make no claim of any unlawful collection action occurring after June 19, 1997. The Harrises, however, filed the instant action on June21, 1999, more than two years after their right of action accrued.[1] As a result, the United States has not waived sovereign immunity to those claims, and the Court is without jurisdiction to entertain them. "Because

[1] In their Response in Opposition to Defendants' Motion to Dismiss, the Harrises insist that they preserved their claims by filing their Original Complaint on June 21, 1999; however, an examination of the face of the Harrises' Original Complaint and of the Court's Docket Sheet reveals that the Original Complaint was in fact filed on June 21, 1999.

the 'time-bar qualifies a waiver of sovereign immunity,' it is jurisdictional in nature." *Overton v. United States*, 202 F.3d 282, at *2(10th Cir. 2000)(table). The claims are therefore dismissed for lack of subject matter jurisdiction.[2]

---

[2] Relatedly, the Court notes that in the Harrises' Supplement to Plaintiffs' Motion to Amend Original Complaint, they add claims involving the United States' alleged failure to send them a Notice of Intent to Levy. The addition of such claims is inappropriate because the Harrises' "supplement" is, in fact, an additional motion to amend their complaint; the supplement purports to add wholly new allegations, rather than merely augmenting claims already pleaded. As a result, the Court finds that the Harrises are not entitled to such claims.

Moreover, to the extent the Harrises' supplement is considered as another motion to amend, the Court denies the motion. While a motion to amend pleadings "shall be freely given when justice so requires, " Fed. R. Civ. P. 15(a), leave to amend is by no means automatic. *Addington v. Farmer's Elev. Ins. Co.*, 650 F.2d 633, 667 (5th Cir. 1981); *Vera v. Buch*, 980 F. Supp. 254, 255(S.D. Tex. 1997) panel op.); *Clemner v. Enron Corp.*, 882 F. Supp. 606, 608(S.D. Tex. 1995). When deciding whether an amendment should be allowed, the district court may consider the futility of the amendment. *Hypes v. First Commerce Corp.*, 134 F. 3d 721, 728(5th Cir. 1998). If the amendment is futile, the district court does not abuse its discretion in denying leave to amend. *Riley Stoker Corp. v. Fidelity and Guar. Ins. Underwriters, Inc.*, 26 F. 3dd 581, 591(5th Cir. 1994)(citing *Foman v. Davis*, 371 U.S. 178, 182(1982).

In this instant case, the Harrises' proposed amendment is futile because it alleges violations by the IRS that occurred on April 28, 1997, the day the levies were served. Again, the instant case was filed on June 21, 1999, more than two years after the Harrises' right of action accrued. The claims are therefore time-barred. See 26 U.S.C. 7433(d).

With regard to the Harrises' three claims of unauthorized disclosure, the United States moves for dismissal and for summary judgment, arguing that Officer Luckey's alleged disclosure to ABC Land Company occurred more than two years prior to the Harrises institution of the instant lawsuit, and that the IRS's two comments to the Conroe Courier did not constitute unlawful disclosures as a matter of law.

Again, the Court finds the United State's arguments well taken. First, the Harrises' allegations that Officer Luckey unlawfully disclosed tax return information to ABC Land Company must be dismissed because the alleged disclosure occurred on April 28, 1997. As discussed above, the instant case was instituted on June 21, 1999, more than two years after the Harrises' right of action accrued. Because 26 U.S.C. §7433(d) imposes a two-year limitation on claims bought against the IRS, the Court holds that the Harrises' particular claim regarding disclosures to ABC Land Company are dismissed for lack of subject matter jurisdiction. See Overton, 202 F.3d at *2.

Second, the United States is entitled to summary judgment on the Harrises' remaining two claims for unlawful disclosure. Under Rule 56(c)

of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exist and that, as a matter of law, the movant is entitled to judgment. *Little v. Liquid Air Corp.*, 37 F. 3d 1069, 1075(5th Cir. 1994). "[T] he substantive

law will identify which facts are material." *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248(1986). Only disputes about material facts will preclude the granting of summary judgment. Id. In a motion for summary judgment, the burden is on the movant. *Latimer v. Smithkline & French La.*, 919 F.2d 303(5th Cir. 1990). If the nonmovant bears the burden of proof at trial, however, the movant for summary judgment need not support the motion with evidence negating the opponent's case. Instead, the movant may satisfy its burden by showing that there s an absence of evidence to support the nonmovant's case. Id, *Little*, 37 F. 3d at 1075.

Once the movant makes this showing, the burden shifts to the nonmovant to sow that summary judgment is not appropriate. Little, 37 F.3d at 1075(citing *Celotex Corp. v Catrett*, 477 U.S. 317, 325(1986). "This burden is not satisfied with 'some metaphysical doubt as to the material facts'...by 'conclusory allegations'...by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence. Id. (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586(1986); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 871 73 (1990); *Hopper v. Frank*, 16 F.3d 92, 97(5th Cir. 1994); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086(5th Cir. 1994). Rather, the nonmoving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*, 475 U.S. at 587(quoting Fed. R. Civ. O. 56(e)). In determining whether a genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the

nonmovant. *Richter v. Merchants Fast Motor Line, Inc.*, 83 F. 3d 96, 98 (5th Cir. 1996)(per curiam); *Gremillion v. Gulf Coast Catering Co.*, 904 F2d 290, 292(5th Cir. 1990).

As discussed above, the Harrises claim that Luckey's statement in the Conroe Courier that the Harrises' tax liability was "in the hundreds of thousands of dollars" violated 26 U.S.C. §6103. Similarly, the Harrises argue that Holmes violated §6103 when he made the following statement in the Conroe Courier:

> 1.We try to work with people and will work with them as far as we can, and we understand when tax situations get to this point that people are very understandably going to be unhappy about it...but there's really no alternative.
>
> 2.The bottom line is that we're not in the auction business, we're in the tax collection business, and on any given case, we would much rather collect the tax. We don't put something up for sale unless it's the last resort.
>
> 3.It's a difficult situation, and we certainly understand where a taxpayer wants to off their taxes but simply can't.
>
> 4. And we'll go as far as we can with the taxpayers, and I just hope other taxpayers understand that the IRS

> really does not engage in the sale of property unless it's the end of the line and has become evident that the taxpayer cannot or will not be able to pay off their debt.

Section 6103 mandates that "no officer employee of the United States... who has or had access to returns or return information...shall disclose any return or return information obtained by him in any manner in connection with his service as such officer or an employee...."26 U.S.C. §6103(a).

In its Motion for Summary Judgment, the United States argues that Luckey's comment falls outside §6103's prohibition because it was public information. Specifically, the district court had entered its Amended Final Judgment on May 7, 1993, detailing that Susette M. Harris had a tax liability of $113,552.26, and that Ronald G. Harris had a tax liability of $99, 195.15. Pursuant to Texas law, the judgment was entered into the records of the Montgomery County Courthouse because the Harrises' residence was located in Montgomery County.

While the United States concedes that §6103 contains no express exception authorizing the disclosure of tax information that has become a matter of public record, it nonetheless points to case law supporting the existence of such an exception. Indeed, as the United States correctly observes, circuits are split on the matter. Compare *William E. Schrambling Accountancy Corp. v. United States*, 937 F. 3d 1485(9th Cir. 1991)(holding that information contained in a Notice of Federal Tax Lien and in

a taxpayer's bankruptcy petition was no longer confidential information within the meaning of §6103), Mallas v. United States, 993 F.3d 111(4th Cir. 1993)(concluding that the lack of an express exception for public information in §6103 indicated no exception exists). As the Ninth Circuit explained in recognition of the exception, "Congress sought to prohibit only disclosure of confidential tax return information. Once tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy of that information. Thus if a taxpayer's return information is lawfully disclosed in a judicial proceeding..., the information is no longer confidential and may be disclosed again without regard to section 6103." Lampert v. United States, 854 F. 2d 335, 337-38(9th Cir. 1988), cert denied, 490 U.S. 1034(1989). The Seventh circuit, rather than adopting a "public record" exception, instead embraced the "immediate source" test, where §6103 is not implicated if the "immediate source [of the taxpayer information] is a public document lawfully prepared by agency that is separate from the [IRS] and has lawful access to tax returns." *Thomas v. United States*, 890 F.2d 18, 21(7th Cir. 1989).

At the time of the alleged disclosures of the instant case, the Fifth Circuit had not articulated a rule regarding the contours of §6103 disclosure; two months later, however, the Fifth Circuit adopted the Seventh's Circuit "immediate source" test in *Johnson v. Sawyer*, 120 F.2d 1307(5th Cir 1997). As the Johnson court held, "If the immediate source of the information claimed to be wrongfully disclosed is

tax return information ("return" or "return information" pursuant to §6103), the disclosure violates §6103, regardless of whether that information has been previously disclosed (lawfully) in a judicial proceeding and has therefore arguably lost its taxpayer' confidentiality." *Id.* At 1318-19. Thus, while the Fifth Circuit has adopted the "immediate source" standard, it has rejected the notion that mere "public information" lies outside the scope of §6103. See ID. ("[W] e decline to follow the Ninth and Sixth Circuits and judicially create an exception to §6103 for tax return information disclosed in 'public records.'")

In this case, the Court rejects the United State's argument that it is entitled to summary judgment merely because the Harrises' tax liability was public information. That is not the standard the Fifth Circuit articulated in Johnson. Moreover, the record is unclear whether the "immediate source" of Officer Luckey's comments regarding the Harrises' tax liability was public court documents or from her own personal knowledge as an agent working on the Harrises' case. A genuine issue of material fact thus exists as to whether Luckey's comment to the Conroe Courier that the Harrises owed "in the hundreds of thousands of dollars" violated §6103's prohibition.

See 26 USC §6103(b)(2)(A)(prohibiting specifically the disclosure of a taxpayer's tax liability).

Nonetheless, the United States is entitled to summary judgment on the matter by virtue of 26 U.S.C. §7431(b)'s "good faith exception." Section 7431(b) provides that "[n]o liability shall

arise under this section with respect to any inspection or discourse...which results form a good faith, but erroneous interpretation of section 6103...." 26 U.S.C. 7431§(b). " Congress intended that 'disclosures which give to civil liability are limited to those situations where the unauthorized disclosure results from willful or negligent failure of the person to comply with the procedures and safeguards provided' under §6103..." *Elias v. United States*, No. CV 90-0432-WJR (JRX), 1990 WL 264722, at *9 n. 2(C.D. Cal. Dec 21, 1990)(citing Joint Committee, General Explanation of the Tax Reform Act of 1976, Pub.L. No. 94-455, 94th Cong. 2d Sess. At 345(1976-3 Cum. Bull. (Vol. 2) at 357). The Fifth Circuit has held that the test for good faith under §7431(b) "should be judged by an objective standard [where]...'[an agent's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Huckaby v. United States*, 794 F.2d 1041, 1048(5th Cir. 1986))(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818(1982)), cited in, *Gandy v. United States*, 234 F.3d 281, 285(5th Cir. 2000). The court in Huckaby also state that, with regard to the good faith standard, "a reasonable IRS agent would have known of rights provided by these [Internal revenue Code] sections, and his own agency's applicable regulations and internal rules. Id.

In the instant case, the Court finds that Luckey's comment to the Conroe Courier was in good faith as a matter of law because her conduct did not violate clearly established statutory or constitutional rights with regard to

the Fifth Circuit's interpretation of §6103. At the time her comment was made, the Fifth Circuit had not decided *Johnson v. Sawyer*, and it is undisputed that state of the law in the Fifth Circuit was unsettled, and that a split existed among the circuits regarding whether a disclosure of "public information" fell outside the scope of §6103. Moreover, the IRS's own disclosure rules, promulgated in the Disclosure of Official Information Handbook, IRM 1272, provided that "Internal Revenue Service policy permits and encourages press releases and responses to media inquiries regarding enforcing activities that have become a matter of public record..." *Id.*at (11)(14) 0(Rev. 1-10-95)(emphasis added). Luckey's comment therefore did not contravene either Fifth Circuit law or IRS policy at the time it was made. Under the standard articulated in *Huckaby*, good faith underlay Luckey's comment as a matter of law. See *Huckaby*, 794 F.2d 1048(establishing that good faith exists for a §6103 disclosure when the disclosure "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

With regard to Officer Holmes's general comments on IRS enforcement practices, the Court similarly finds that they did not reveal the Harrises's tax return information in violation of §6103. According to the statute, a taxpayer's "return information" included:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld,

deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense....26U.S.C. §6103(b)(2)(A).

As indicated above, Holmes's comments to the Conroe Courier pertained to general principles of IRS tax enforcement, *vis a vis* IRS auctions. It is undisputed that Holmes did not identify the Harrises by name, nor did he provide any detail regarding their income, assets, liabilities, net worth, deficiencies, or payments. Holmes also did not mention any other investigations pending, or possibly pending, against the Harrises. Rather, the Court finds that Holmes's comments were strictly general in nature, and as such were outside the scope of §6103's prohibition on tax return disclosure. *CF Mittleman v. U.S. Dep't of Treas*ury, 919 F. Supp. 461, 468(D.D.C. 1995)("[A] statement of general provisions of law does not implicate the general nondisclosure provisions of the Privacy Act."). The United States is entitled to summary judgment on the Matter.

III. CONCLUSION

In this case, the Harrises sue for alleged unlawful collection actions and alleged unlawful

disclosures. Because three of the five violations occurred more that two years before the Harrises filed the instant suit, the claims are time-barred, and the Court has no jurisdiction to adjudicate them. The two claims that are not time barred, involving statements made by Revenue Officers Luckey and Holmes did not violate §6103 because the former was made in good faith, and the latter did not contain information within the scope of the statute. Accordingly, the Court

ORDERS that Plaintiffs' motion for Summary Judgment is DENIED;

ORDERS that Defendant's Motion to Dismiss and for Summary Judgment is GRANTED;

ORDER that Plaintiff's time–barred claims are DISMISSED. SIGNED at Houston, Texas, this 31st of March, 2001.

S:/ MELINDA HARMON

UNITED STATES DISTRICT JUDGE

UNITED STATES COURTS

SOUTHERN DISTRICT OF TEXAS

ENTERED APR 2-2001

MICHAEL N. MILBY

CLERK OF COURT